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April 25, 2011

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

229389

RE: Docket No. 42104, *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc.*
Finance Docket No. 32187, *Missouri & Northern Arkansas Railroad Company, Inc.–Lease, Acquisition and Operation Exemption–Missouri Pacific Railroad Company and Burlington Northern Railroad Company*

Dear Ms. Brown:

Enclosed for efiling is the Reply of the Missouri & Northern Arkansas Railroad Company, Inc. to the Petition for Reconsideration filed by Arkansas Electric Cooperative Corporation.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,

Louis E. Gitomer
Attorney for Missouri & Northern Arkansas
Railroad Company, Inc.

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.
v.
UNION PACIFIC RAILROAD COMPANY AND MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
–LEASE, ACQUISITION AND OPERATION EXEMPTION–
MISSOURI PACIFIC RAILROAD COMPANY AND
BURLINGTON NORTHERN RAILROAD COMPANY

REPLY OF MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC. TO ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S PETITION FOR RECONSIDERATION

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Dated: April 25, 2011

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Missouri & Northern Arkansas Railroad Company, Inc. ("M&NA") replies in opposition to the Petition for Reconsideration filed on April 4, 2011 (the "Petition") by Arkansas Electric Cooperative Corporation ("AECC"). M&NA respectfully requests the Surface Transportation Board (the "Board") to deny the Petition.

BACKGROUND

In *Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company*, STB Docket No. NOR 42104 (STB served March 15, 2011) (the "*2011 Decision*"), the Board found: (1) that the Independence Steam Electric Station (the "Plant") has a statutory right to service by

BNSF Railway Company ("BNSF") from the northern Powder River Basin (the "PRB") mines; (2) that Entergy[1] and AECC did not show that the service problems that ISES experienced were the result of anticompetitive conduct by Union Pacific Railroad Company ("UP") or M&NA and that the proposed BNSF/M&NA route is not better or more efficient than the existing UP/M&NA route; and (3) that it was unable to reach a majority decision on the Entergy and AECC request to revoke agency approval of the UP-M&NA lease, and the lease authority therefore remains in effect.

AECC seeks reconsideration of the second and third findings made by the Board on the ground that the Board committed material error by failing to consider the evidence provided by AECC. AECC erroneously argues that the Board failed to consider AECC's evidence, that the Board did not apply the appropriate standards, and that the Board has left M&NA unprotected from adverse action by UP.

1. The Board considered and rejected AECC's evidence.

The Parties submitted substantial evidence after Entergy filed a Second Amended Complaint seeking the prescription of a through route pursuant to *Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company*, STB Docket No. NOR 42104 (STB served June 26, 2009) (the "*2009 Decision*").

After the submission of the evidence, the Board held oral argument on October 26, 2010, where factual matters and argument were presented by Entergy, UP, BNSF, M&NA and AECC to the three Board members who made the *2011 Decision*. Indeed, at the argument, the Board

[1] Entergy Arkansas, Inc. and Entergy Services, Inc. are the Complainants in the instant proceeding and are jointly referred to as "Entergy."

members indicated that they had read all of the evidence presented. Having read the evidence and argument presented by AECC, as well as the other parties, and heard those parties at oral argument; it is obvious that the Board considered AECC's evidence in reaching the *2011 Decision.*

In the *2011 Decision*, the Board stated numerous times that it had considered the parties' evidence: (1) "the **evidence** supplied by the parties establishes that the existing UP-MNA routing is more efficient ('better') than the BNSF-MNA routing Entergy has requested" at 8; (2) "[t]he **vast majority of the evidence** is directed at the question of whether UP/MNA has engaged in anticompetitive conduct by foreclosing the use of a 'better' alternative BNSF/MNA route" at 11; (3) "[w]eighing **the totality of the evidence** before us, we find that the proposed BNSF/MNA Route has not been shown to be a superior route to serve Entergy" at 13; and (4) "we find no **evidence** that UP and MNA have exploited their market power by seeking to foreclose a 'better' BNSF/MNA route" at 14 (emphasis added).

AECC is wrong in arguing that the Board committed material error in the *2011 Decision* because it did not consider the evidence submitted by AECC. At oral argument, the Board stated that it had read the evidence, and then in the *2011 Decision* the Board stated that it had considered the evidence in the record in making its necessary conclusions. In the *2011 Decision*, the Board considered and rejected the evidence submitted by Entergy and AECC in seeking prescription of a BNSF/M&NA joint for coal shipments originating in the southern PRB. Therefore, M&NA urges the Board not to reconsider the *2011 Decision.* There is no need to consider AECC's unpersuasive evidence a second time.

Even though AECC is not entitled to reconsideration of its evidence, M&NA contends that the results of any reconsideration would lead to the same result as in the *2011 Decision* – the UP-M&NA route is and will be more efficient than the BNSF-M&NA route. Entergy and UP agree that an alternate route over BNSF-M&NA would require the upgrade of the M&NA portion of the route, although there is disagreement about the upgrades required. The Board found the current UP-M&NA roundtrip route to be more efficient than the proposed BNSF-M&NA roundtrip route. There is also agreement that the shortest route between the southern PRB and the Plant is via an interchange between UP and M&NA at Kansas City, as is used on the northbound movement of empty trains. If the upgrades to the M&NA were completed, the UP-M&NA route south bound out of the southern PRB via Kansas City would be able to use those upgrades and would be even more efficient than the proposed BNSF-M&NA route. As long as the Board compares existing conditions on the UP-M&NA roundtrip route to the proposed BNSF-M&NA roundtrip route or based on the conditions after upgrades to the M&NA, it is clear that the UP-M&NA roundtrip route is more efficient. Comparison of current conditions to future improvements would be unreasonable, arbitrary, and capricious, since enough money can always be spent to make a longer route more efficient.

2. The Board followed the standards that apply to this proceeding as set forth in the *2009 Decision*.

AECC argues that the Board failed to apply the "law of the case." Petition at 13. M&NA contends that the Board did not fail to apply the "law of the case." M&NA argues that AECC has misread the *2009 Decision* and now asks the Board to improperly ignore the governing statute and regulations.

The *2009 Decision* did not grant Entergy or AECC the relief they sought. Instead, the Board stated that it "clarifies the appropriate avenue for a shipper to seek relief from a carrier's interchange commitment and gives the complainant an opportunity to show that a new through route should be prescribed under 49 U.S.C. 10705." *Id.* at 1.

In the *2009 Decision* at 7, the Board stated that "further examination under section 10705 is warranted for a number of reasons." The Board went on to describe the factors that it would consider if Entergy chose to file an amended complaint when the Board stated, at page 8:

> In this next phase of the case, the parties should be guided by section 10705 and the discussions concerning alternative route prescriptions in CP&L. The Board has declined to "declare in advance" precisely what showing would justify the prescription of a through route because that question is necessarily fact-specific. See CP&L, 1 S.T.B. at 1069. Thus, the question of how to establish that a foreclosed route is "more efficient" under 10705 is a matter of first impression and we will consider all relevant factors. Those factors should include, but are not limited to, those listed in 49 CFR 1144.2(a)(1), such as the revenue associated with the traffic, the relative costs of moving traffic on the alternative routes, and the volume of traffic that could be expected to move over the alternative route.
>
> As the Board has suggested, the requirements for making the showing to obtain a through route prescription are less rigorous than those required to justify the "far more intrusive" remedies of terminal access or reciprocal switching. CP&L, 1 S.T.B. at 1068-70. Through route prescription merely entails the activation of interchange relationships that, while perhaps dormant, already physically exist. Thus, the question of whether there are "benefits, advantages, and projected efficiencies" that would make service over the proposed new through route "better" than the existing through route (see CP&L, 1 S.T.B. at 1069) involves the consideration of fewer factors regarding issues such as the operational conflicts between multiple carriers operating on a single line.
>
> Our discussion of Entergy's evidentiary burden in a section 10705 challenge presupposes that Entergy would continue to obtain coal from PRB mines served by UP. Should Entergy choose instead to source coal from a northern PRB mine not served by UP (e.g., Dry Fork, Rawhide, Eagle Butte, Buckskin), it would not need to bring a section 10705 case or establish that a particular route is more efficient in order to obtain an alternative route.

The preceding quote is contrary to AECC's claim that the Board ruled that "inadequate service is a ground for prescribing a through route and does not require a showing that the bad service is a result of "competitive abuse'." Petition at 9. Not only is AECC's purported criteria contrary to the Board's pronouncement in the *2009 Decision*, but it is contrary to the specific language of 49 U.S.C. §10705 and 49 C.F.R. §1144.

In addressing the request from Entergy and AECC to prescribe a through rate from the southern PRB to the Plant over BNSF and M&NA, the Board began its analysis by describing the statutory and regulatory analysis that it would follow. In the *2011 Decision* at 7-8 (footnotes omitted) the Board stated:

> To obtain relief under our competitive access rules, Entergy must first meet the statutory requirements. Under 49 U.S.C. § 10705(a)(1), the Board "may, and shall when it considers it desirable in the public interest, prescribe through routes, joint classifications, joint rates, the division of joint rates, and the conditions under which those routes must be operated" for rail carriers providing transportation under its jurisdiction. However, the Board "may require a rail carrier to include in a through route substantially less than the entire length of its railroad . . . only when" certain statutory criteria are met. See 49 U.S.C. § 10705(a)(2). In exercising our discretion, we are instructed to give reasonable preference to the rail carrier originating the traffic when prescribing a through route. *Id.*
>
> The competitive access rules allow the Board to exercise its discretionary authority if the statutory requirements of § 10705 are met and the Board determines a prescription is necessary "to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. § 10101 or is otherwise anticompetitive." 49 C.F.R. § 1144.2(a)(1); *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom. Balt. Gas & Elec.* v. *United States*, 817 F.2d 108 (D.C. Cir. 1987). The Board's regulations state that a showing of anticompetitive conduct applies to all requests for § 10705 relief. 49 C.F.R. § 1144.2(a).
>
> Some Board precedent suggests that a party may be able to obtain a through route prescription under an arguably more relaxed standard than set forth in our regulations. In *CP&L*, the Board suggested that a party could, under certain circumstances, obtain relief after establishing that the prescribed through route

> was "better" or "more efficient" in lieu of making an anticompetitive conduct showing. The Board determined that in such cases "shippers seeking 'through route access' may be able to establish underlying facts on comparative service inadequacies and/or efficiencies necessary to support such relief under the requirements of our [competitive access] rules."
>
> Here, we conclude that Entergy has not met either the competitive access standard in our regulations or the more relaxed standard announced in *CP&L*.

It is clear that the Board has developed a more rigorous burden (as cited above) for the prescription of a competitive route (southern PRB to the Plant) compared to a request for a through route from a new origin (northern PRB to the Plant, see the discussion at page 6 of the *2011 Decision*). The Board relied on section 10705, Part 1144, and, *CP&L* in developing the standards that it used to deny the prescription of a through route between the southern PRB and the Plant. A careful reading of the *2009 Decision* shows that this was the intent of the Board when it provided Entergy with the option of filing an amended complaint.

The Board correctly applied the standard developed in the *2009 Decision* in light of the requirements of section 10705, Part 1144, and, *CP&L*. M&NA contends that AECC has not demonstrated that the Board committed material error in the criteria used by the Board to deny the request for a new through route between the southern PRB and the Plant over BNSF and M&NA. AECC has not justified reconsideration based on this argument.

3. M&NA is not vulnerable to unfettered adverse actions by UP.

AECC argues that M&NA must be protected "from adverse actions by UP that would prevent MNA from participating in a through route in the future." Petition at 18.

M&NA and UP are parties to a Lease. Section 2.02 of the Lease provides M&NA with the ability to extend the lease for three additional 20 year terms by notifying UP between six to twelve months before the expiration of the lease. Regardless of whether the Lease is terminated

by UP or M&NA, Board precedent will require M&NA to obtain discontinuance authority from the Board under 49 U.S.C. §10903 prior to discontinuing service.

The Board has received comments in the rulemaking in Ex Parte No. 705. At this late date and without argument from the parties, M&NA contends that it would be inappropriate for the Board to impose conditions on the *2011 Decision* that relate to uncompleted rulemaking in Ex Parte No. 705.

CONCLUSION

M&NA respectfully requests the Board deny the Petition for Reconsideration filed by Arkansas Electric Cooperative Corporation.

Respectfully submitted,

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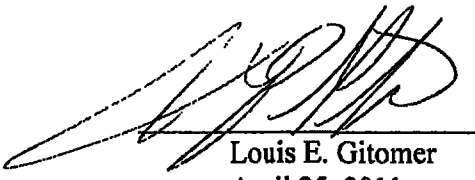
Dated: April 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for Entergy Arkansas, Inc., Entergy Services, Inc., Union Pacific Railroad Company, Arkansas Electric Cooperative Corporation, and BNSF Railway Company electronically.



Louis E. Gitomer
April 25, 2011